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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

STEPHEN W. BERGER et al., Plaintiffs and Appellants, v. PETER DOBIAS, Defendant and Respondent.	B204631, B205455 (Los Angeles County Super. Ct. No. BC320288)

APPEALS from a judgment and orders of the Superior Court of Los Angeles County, Ann I. Jones and Susan Bryant-Deason, Judges. Affirmed.

Law Offices of Stephen W. Berger and Stephen W. Berger for Plaintiffs and Appellants; Amy A. Mousavi for Plaintiff and Appellant Stephen W. Berger.

Law Office of James J. Moneer and James J. Moneer for Defendant and Respondent.

Plaintiffs sued defendant for malicious prosecution and abuse of process arising out of two actions brought by defendant: (1) a civil suit for assault and (2) a petition for an injunction prohibiting harassment (Code Civ. Proc., § 527.6; all further statutory references are to that code unless otherwise indicated). Defendant filed a special motion to strike, contending the malicious prosecution action was a SLAPP (strategic lawsuit against public participation) (§ 425.16). The trial court denied the motion. Defendant appealed (B182072).

In an unpublished opinion filed on November 28, 2006, we held that the anti-SLAPP motion should have been granted in its entirety because plaintiffs did not demonstrate a reasonable probability of prevailing on their claims. (*Berger v. Dobias* (Nov. 28, 2006, B182072) [nonpub. opn.] (*Berger I*)). Accordingly, we reversed the trial court and remanded the matter with directions to grant the anti-SLAPP motion and award attorney fees to defendant.

On remand, the trial court entered a new order granting the anti-SLAPP motion. In three separate hearings, the trial court awarded attorney fees. First, by way of a judgment, the trial court awarded $92,337.25 in attorney fees for the work done on the anti-SLAPP motion and the successful appeal of the order denying that motion. Second, by way of an order, the trial court awarded $5,062.50 in attorney fees for the work done in opposing plaintiffs' unsuccessful motion to reconsider the award of $92,337.25. And third, by way of an order, the trial court awarded $11,043.75 in attorney fees for successfully opposing plaintiffs' ex parte application to vacate the judgment.

Plaintiffs filed two appeals, which have been consolidated. The first appeal (B204631) challenges the order granting the anti-SLAPP motion and the order awarding $5,062.50 in attorney fees for the work performed in opposing plaintiffs' motion for reconsideration. The second appeal (B205455) challenges the judgment awarding $92,337.25 in attorney fees. Neither notice of appeal refers to the third award.

We conclude that plaintiffs' appeal from the order granting the anti-SLAPP motion is procedurally improper because plaintiffs merely reargue the issues presented in *Berger I*. We also conclude that the trial court did not abuse its discretion in awarding attorney fees.

I

BACKGROUND

The following allegations and facts are taken from our opinion in *Berger I* and the papers filed in connection with defendant's subsequent motion for attorney fees.

In our opinion in *Berger I*, we described the allegations of the complaint as stated in the following quoted paragraphs.

"In previous litigation, Peter Dobias filed a civil action against Shannon Tang, his ex-girlfriend and the mother of his daughter (*Dobias v. Tang* (Super. Ct. Orange County, 2001, No. 01NL14900)), alleging causes of action for assault, battery, libel, slander, and intentional infliction of emotional distress (*Dobias* assault action). Dobias knew that the action was brought without probable cause, with malice, and for an improper purpose, namely, to obtain a collateral advantage in separate custody proceedings between Dobias and Tang involving their daughter (*Tang v. Dobias* (Super. Ct. Orange County, No. 99P000965)) (*Tang* custody proceeding).

"In 2003, the *Dobias* assault action was tried to the [court] in Orange County Superior Court. The trial judge found in Dobias's favor on the assault claim but concluded he did not suffer any damage or injury. The trial judge found in Tang's favor on the other claims, stating that Dobias had not proved any damage or injury on the battery claim; the defamation claims (based on allegedly false police reports) failed because Dobias did not establish that the statements at issue were made with malice; and outrageous conduct was not shown on the intentional infliction claim. Judgment was so entered.

"Attorney Stephen Berger, whose office is in Orange County, represented Tang in the *Dobias* assault action and the *Tang* custody proceeding. On Friday, December 5, 2003, in connection with Berger's representation of Tang, Dobias physically assaulted and battered Berger at the Orange County courthouse without provocation or justification.

"On Monday, December 8, 2003, Dobias, a resident of Los Angeles County, filed a 'Petition for Injunction Prohibiting Harassment' [under section 527.6] against Berger in the Van Nuys courthouse of the Los Angeles County Superior Court, alleging Berger had attacked him the previous Friday (*Dobias v. Berger* (Super. Ct. L.A. County, 2003,

No. LS012019)) (*Dobias* harassment petition). Dobias knew that his petition was filed without probable cause, with malice, and for an improper purpose, namely, to interfere with Berger's legal representation of Tang in the *Tang* custody proceeding. At an initial hearing, the trial judge denied Dobias's request for a temporary restraining order and, at a subsequent hearing, denied an injunction. Berger's request for attorney fees was denied.

"On August 19, 2004, Berger and Tang (plaintiffs) filed this action against Dobias in which Berger alleged (1) malicious prosecution based on the *Dobias* harassment petition and (2) abuse of process based on the *Dobias* harassment petition, while Tang alleged malicious prosecution based on the *Dobias* assault action. [Berger represented Tang and himself.] [¶] . . .

"On December 27, 2004, Dobias filed an anti-SLAPP motion [see § 425.16], arguing that (1) plaintiffs were not likely to prevail on the malicious prosecution claims because he relied on the advice of counsel in instituting the *Dobias* assault action and the *Dobias* harassment petition, and (2) the abuse of process claim lacked merit because it did not allege any misuse of the legal process, and, in addition, the claim was barred by the litigation privilege (Civ. Code, § 47, subd. (b))." (*Berger I*, B182072.)

By order dated January 27, 2005, the trial court, Judge David A. Workman presiding, denied the motion. Dobias appealed.

In *Berger I*, we reversed the order denying the anti-SLAPP motion. We explained that Tang was not reasonably likely to prevail on her malicious prosecution claim because Dobias had submitted evidence supporting his defense of advice of counsel. Berger's malicious prosecution action would fail in light of *Siam v. Kizilbash* (2005) 130 Cal.App.4th 1563 (*Siam*), which held that "the unsuccessful filing of a petition for an injunction under section 527.6 may not form the basis for a malicious prosecution action." (*Id.* at p. 1574.) And Berger's abuse of process claim would not succeed because he did not allege "'the improper use of . . . process *after it . . . issued*.'" (*Id.* at p. 1579.) We directed the trial court to enter an order granting the anti-SLAPP motion and to award Dobias attorney fees and costs. (*Berger I*, B182072.)

Plaintiffs filed a petition for review in the Supreme Court. The petition was denied on February 28, 2007 (S148751).

After remand to the trial court, Dobias filed a motion for attorney fees, seeking an award of $110,299.75. (See § 425.16, subd. (c) ["a prevailing defendant on a special motion to strike shall be entitled to recover his or her attorney's fees and costs"].) Dobias's attorney submitted a 27-page declaration describing in detail the hours worked, the services performed, his change in hourly rates during the course of the litigation, and the calculations supporting the fee request. Plaintiffs filed opposition. Dobias filed a reply and sought an additional $8,887.50 in attorney fees for preparing it. On July 30, 2007, the motion was heard, and the trial court, Judge Ann I. Jones presiding, awarded $72,337.25 in attorney fees.

On August 8, 2007, plaintiffs filed a "Request for Correction of Error in Ruling on Anti-SLAPP Attorney's Fee Motion," seeking to reduce the award by $5,000. Dobias filed a "response" opposing the request. By order dated August 17, 2007, the trial court denied the request.

For his part, Dobias filed a motion to correct the amount of the award. Plaintiffs filed opposition. By order dated September 20, 2007, the trial court granted the motion and increased the award by $20,000 to reflect attorney fees advanced by Dobias to his attorney. The trial court stated that the omission of the $20,000 was a clerical error.

Meanwhile, on August 14, 2007, plaintiffs had filed a motion for reconsideration of the award. Dobias filed opposition and requested additional attorney fees of $5,062.50. Dobias's attorney submitted a declaration supporting the request for fees, stating he had spent 11.25 hours opposing the motion, and his billing rate was $450 an hour. Plaintiffs waived argument on the motion. By order dated October 16, 2007, the trial court denied the motion for reconsideration on the ground that there were no "new or different facts, circumstances, or law." (§ 1008, subd. (a).) The court also awarded Dobias $5,062.50 in attorney fees for opposing the motion.

On October 17, 2007, Judge Jones signed a "Judgment of Dismissal and for Attorney's Fees," dismissing the complaint with prejudice and awarding Dobias $92,337.25 in attorney fees. The judgment was file stamped but not entered. Also on October 17, Judge

Jones signed an order — pursuant to our opinion in *Berger I* — granting Dobias's anti-SLAPP motion. The order was filed and entered. A minute order of the same date stated that Judge Jones had reviewed the proposed judgment and proposed order and had found them to be proper.

On November 15, 2007, plaintiff Berger filed a declaration seeking to disqualify Judge Jones on the grounds that (1) a person aware of the facts might reasonably entertain a doubt that Judge Jones could be impartial and (2) Judge Jones was biased against Berger in his capacity as the attorney for Tang and himself. (See § 170.1, subd. (a)(6)(A)(iii), (B), formerly subd. (a)(6)(C).) The clerk did not show the request for disqualification to Judge Jones within 10 days of its filing.

On or about November 2, 2007, Dobias submitted a proposed "First Amended Judgment of Dismissal and for Attorney's Fees." Unlike the judgment previously signed, the first amended judgment recited that Dobias was entitled to $5,062.50 in attorney fees for successfully opposing plaintiffs' motion for reconsideration.

On November 26, 2007, Judge Jones signed the first amended judgment, which was filed and entered.

On November 29, 2007, Judge Jones issued a decision in response to Berger's request for disqualification. The judge explained that the clerk had not brought the request to her attention "until the time for a response had expired." As a consequence, the judge was deemed by law to have consented to the reassignment of the case. (See § 170.3, subd. (c)(3), (4) [if judge does not respond to request for disqualification within 10 days after filing, judge shall be deemed to have consented to recusal and appointment of a replacement].)

The case was reassigned to Judge Susan Bryant-Deason. A status conference was scheduled for January 17, 2008.

On December 17, 2007, plaintiffs filed a notice of appeal with respect to the October 16, 2007 order awarding Dobias $5,062.50 in attorney fees and the October 17, 2007 order granting Dobias's anti-SLAPP motion. The notice contained a typed "note" stating, "There is no Judgment of Dismissal in the case file, despite reference to a Judgment of Dismissal in the Court's 10/17/07 Minute Order . . . ."

At the status conference on January 17, 2008, plaintiffs filed an ex parte application for an order vacating the first amended judgment on the ground Judge Jones had signed it after the effective date of her "deemed" disqualification. The trial court continued the status conference and the hearing on the application to February 4, 2008.

On January 28, 2008, plaintiffs filed a notice of appeal with respect to the October 17, 2007 "Judgment of Dismissal and for Attorney's Fees" and the November 26, 2007 first amended judgment. The notice contained the same typed "note" as the prior notice of appeal, indicating that the October 17 judgment was not in the case file.

At the February 4, 2008 hearing, the trial court ruled that the first amended judgment, dated November 26, 2007, was void because it was entered after Judge Jones was disqualified. The trial court also ruled that the original judgment, dated October 17, 2007, was "reinstated" and was "signed, filed and entered nunc pro tunc, as of 10/17/07." The court found that the failure to enter the original judgment was a clerical error subject to correction pursuant to the court's "inherent power." A minute order dated February 4, 2008 explained the trial court's decision.

On February 8, 2008, plaintiffs filed an ex parte application for an order vacating the nunc pro tunc order. Plaintiffs argued that their notice of appeal — from the unentered original judgment — deprived the trial court of jurisdiction to issue an order subsequently entering the judgment. The trial court continued the hearing on the application to February 27, 2008.

Dobias filed opposition and requested additional attorney fees of $28,115.13 related to opposing the application. Dobias's attorney submitted a declaration describing in detail the basis for the fee request.

On February 25, 2008 — two days before the hearing — plaintiffs filed a request that the application not be heard. The same day, plaintiffs filed a *motion* to vacate the judgment pursuant to section 663 (as distinguished from their pending *application* to vacate the judgment). In a memorandum supporting the motion, plaintiffs argued, among other things, that the trial court lacked jurisdiction to order that the original judgment be entered nunc pro

tunc and that the award of $92,337.25 in attorney fees was not supported by the evidence. The motion was set for hearing on March 26, 2008.

Notwithstanding plaintiffs' request, the trial court conducted a hearing on their February 8 application to vacate the nunc pro tunc order. The application was heard on February 27, 2008. The trial court denied the application and awarded Dobias $11,043.75 in attorney fees.

On March 11, 2008, Dobias filed opposition to plaintiffs' *motion* to vacate. Plaintiffs filed a reply. By minute order dated March 24, 2008, the trial court took the motion off calendar, stating that the court no longer had jurisdiction to hear the motion. The court also stayed all matters pending appeal.

By order dated July 28, 2008, we ordered that the appeals be consolidated for all purposes.

II

DISCUSSION

Where an appeal presents an issue based on undisputed facts, we review the trial court's decision de novo. (See *State Farm Mutual Automobile Ins. Co. v. Superior Court* (2003) 114 Cal.App.4th 434, 439; *Iliff v. Dustrud* (2003) 107 Cal.App.4th 1201, 1206–1207; *Cruz v. Fagor America, Inc*. (2007) 146 Cal.App.4th 488, 495–496.) We review an award of attorney fees for an abuse of discretion. (See *Ketchum v. Moses* (2001) 24 Cal.4th 1122, 1130, 1134 (*Ketchum*).)

A. The Order Granting the Anti-SLAPP Motion

In our opinion in *Berger I*, filed on November 28, 2006, we reviewed Judge David Workman's order denying Dobias's anti-SLAPP motion and reversed, directing the trial court on remand to enter an order granting the motion. On October 17, 2007, Judge Ann Jones entered the order as directed. On December 17, 2007, plaintiffs appealed the October 17 order, and they now argue *in this appeal* that *Berger I* was wrongly decided.

This aspect of the appeal is procedurally barred. Plaintiffs unsuccessfully sought Supreme Court review of our decision in *Berger I*, and the petition was denied. The remittitur issued on March 7, 2007. *Berger I* is final for all purposes. The trial court's

October 17, 2007 order was entered pursuant to our disposition in that appeal. There is no legal basis for a *second* appeal addressing whether the anti-SLAPP motion should have been granted. In *Berger I*, plaintiffs had a full and fair opportunity before this court to make *all* arguments concerning the trial court's ruling on the anti-SLAPP motion. A second opportunity is not permitted even if plaintiffs have developed new arguments on the matter. (See *Alpha Mechanical, Heating & Air Conditioning, Inc. v. Travelers Casualty & Surety Co. of America* (2005) 133 Cal.App.4th 1319, 1326–1327; *Bell v. Farmers Ins. Exchange* (2004) 115 Cal.App.4th 715, 727–728.) We therefore decline to consider plaintiffs' challenge to our prior decision.

B. The October 17, 2007 Judgment

In the original judgment, dated October 17, 2007, Judge Jones awarded Dobias $92,337.25 in attorney fees for bringing the anti-SLAPP motion and for successfully pursuing the appeal of the order denying the motion (*Berger I*). Although the judgment was signed and file stamped, it was not entered. As a consequence, the judgment was ineffectual and not appealable. (See *Murphy v. Madden* (1900) 130 Cal. 674, 675–676; Cal. Rules of Court, rule 8.104(a), (d).) But the judgment was not void. (See *In re Clarke* (1889) 125 Cal. 388, 395.)

Plaintiffs argue on appeal, as they did in the trial court, that Judge Bryant-Deason lacked jurisdiction to enter the judgment nunc pro tunc because they had already filed appeals in the case. It follows, they say, that the judgment is void. As plaintiffs correctly point out, "[u]nder section 916, 'the trial court is divested of' subject matter jurisdiction over any matter embraced in or affected by the appeal during the pendency of that appeal. . . . 'The effect of the appeal is to remove the subject matter of the order from the jurisdiction of the lower court. . . .' . . . Thus, 'that court is without power to proceed further as to any matter embraced therein until the appeal is determined.' . . . And any 'proceedings taken after the notice of appeal was filed are a nullity.' . . . This is true even if the subsequent proceedings cure any purported defect in the judgment . . . appealed from." (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 196–197, citations & fn. omitted; accord, *Sacks v. Superior Court* (1948) 31 Cal.2d 537, 540, 541.)

But it is also well settled that "'[w]here a judgment or order is rendered, but, through negligence or inadvertence of the clerk, is not entered at the proper time, the court may order its entry nunc pro tunc. . . .' '"[W]here an order has actually been made and its entry omitted, . . . it may be subsequently entered, and if justice requires, may be made to take effect nunc pro tunc as of the date when it was actually made. . . .'" . . . [¶] . . . [¶] The perfection of plaintiff's appeal did not deprive the court of its inherent power to remedy what was merely a clerical error by entering the omitted order nunc pro tunc. . . . The court's action is properly viewed as the correction of a *clerical*, as opposed to *judicial* error because it merely corrected the record to reflect an order actually made prior to judgment rather than entering a new order not previously made." (*Bed, Bath & Beyond of La Jolla, Inc. v. La Jolla Village Square Venture Partners* (1997) 52 Cal.App.4th 867, 883–884, citations & fn. omitted; accord, *Williamson v. Plant Insulation Co.* (1994) 23 Cal.App.4th 1406, 1415.)

Thus, Judge Bryant-Deason had jurisdiction on February 4, 2008, to issue an order directing entry of the October 17, 2007 judgment nunc pro tunc as of October 17, 2007. The judgment is therefore valid.

Plaintiffs blame Dobias and his attorney for the *court clerk's* failure to enter the judgment on October 17, 2007. For instance, plaintiffs fault Dobias for not serving a notice of entry of the judgment. Plaintiffs also contend they suffered prejudice from the nunc pro tunc order because it prevented the trial court from hearing their subsequent motion to vacate the judgment and because Judge Bryant-Deason issued the order without prior notice and an opportunity to be heard.

We conclude plaintiffs' contentions are without merit. A notice of entry of the judgment would not have changed anything: The judgment had, in fact, *not* been entered. Judge Bryant-Deason's order simply put the parties in the position they *should have been in* as of October 17, 2007. And plaintiffs have not *demonstrated* prejudice. A bald assertion of prejudice is insufficient. Further, the motion to vacate consisted of arguments that either were previously rejected by the trial court, should have been raised in opposing Dobias's motion for attorney fees, or are raised and decided in this appeal.

Accordingly, we treat plaintiffs' appeal from the October 17, 2007 judgment as premature and reach the merits of that appeal. (See Cal. Rules of Court, rule 8.104(e).)

1. "Retroactive" Application of *Siam*

Berger's malicious prosecution claim was based on the *Dobias* harassment petition. In concluding that Berger would not prevail on his claim, we relied on *Siam*, *supra*, 130 Cal.App.4th 1563, which held that an unsuccessful petition for an anti-harassment injunction under section 527.6 did not provide a basis for a malicious prosecution claim. Berger contends that, because *Siam* was handed down *after* he filed his malicious prosecution claim, the *trial court* violated due process by awarding attorney fees against him for pursuing a claim that was proper when it was filed. He argues that *Siam* cannot be retroactively applied as a basis for imposing attorney fees.

"The general rule that judicial decisions are given retroactive effect is basic in our legal tradition." (*Newman v. Emerson Radio Corp*. (1989) 48 Cal.3d 973, 978; accord, *Waller v. Truck Ins. Exchange, Inc.* (1995) 11 Cal.4th 1, 24.) On the other hand, "'retroactive application of a decision *disapproving* prior authority on which a person may reasonably rely in determining what conduct will subject the person to penalties, denies due process.'" (*Olszewski v. Scripps Health* (2003) 30 Cal.4th 798, 829, italics added; accord, *Moss v. Superior Court* (1998) 17 Cal.4th 396, 429–430.) "Retroactive application of an *unforeseeable* procedural change is disfavored when such application would deprive a litigant of 'any remedy whatsoever.'" (*Woods v. Young* (1991) 53 Cal.3d 315, 330, italics added.) "[J]udicial decisions, particularly those in tort cases, are generally applied retroactively. . . . But considerations of fairness and public policy may require that a decision be given only prospective application. . . . Particular considerations relevant to the retroactivity determination include the reasonableness of the parties' reliance on the *former* rule, the nature of the *change* as substantive or procedural, retroactivity's effect on the administration of justice, and the purposes to be served by the *new* rule." (*Ibid.*, italics added.)

Berger's contention is flawed because *Siam* did not overrule prior authority, constitute a change in the law, replace a former rule, or announce a new rule. At most, it extended

existing legal rules to the facts before it, producing a reasonably foreseeable result. *Siam* itself recognized that it was not a groundbreaking decision, saying, "We conclude that pursuant to the policy enunciated in *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, a cause of action for malicious prosecution may not be based upon an unsuccessful civil harassment petition." (*Siam, supra,* 130 Cal.App.4th at p. 1567.) Further, "'[w]hile the filing of frivolous lawsuits is certainly improper and cannot in any way be condoned, in our view the better means of addressing the problem of unjustified litigation is through the adoption of measures facilitating the speedy resolution of the initial lawsuit and authorizing the imposition of sanctions for frivolous or delaying conduct within that first action itself, rather than through an expansion of the opportunities for initiating one or more additional rounds of malicious prosecution litigation after the first action has been concluded.'" (*Siam,* at p. 1571, quoting *Sheldon Appel,* at p. 873.)

Siam also relied on and extensively discussed: (1) *Bidna v. Rosen* (1993) 19 Cal.App.4th 27, which applied the reasoning of *Sheldon Appel* and held that an action for malicious prosecution cannot be based on motions and orders to show cause in family law proceedings; and (2) *Pace v. Hillcrest Motor Co.* (1980) 101 Cal.App.3d 476, which "exempted [small claims actions] from the scope of a malicious prosecution claim." (*Siam,* at pp. 1571–1572.) As the Court of Appeal stated in *Siam*, "The reasoning of *Bidna* and *Pace* is applicable here." (At p. 1572.)

Thus, we conclude that the purportedly retroactive application of *Siam,* which provided the basis in part for an award of attorney fees against Berger, did not violate due process.

2. Use of a Multiplier

Dobias could not afford his attorney's hourly rate, so they agreed that Dobias would advance $20,000 for the work on the anti-SLAPP motion and the appeal to reverse the order denying the motion. That amount would cover only part of the work. Dobias's attorney agreed to assume the risk of the outcome as to the unpaid work, accepting it on a contingency basis. When the trial court awarded $92,337.25 in attorney fees, it "backed out" the noncontingent $20,000 paid by Dobias and applied a multiplier of two to the contingent

portion of the attorney fee award. (In its July 30, 2007 award of $72,337.25, the trial court neglected to add the $20,000 "back in." It properly corrected this error in its September 20, 2007 order.)

The trial court stated that the use of a multiplier "is wholly justified in light of the exceptional quality of the work, the complexity of the issues presented and the need to bring sufficient incentives for attorneys . . . to enforce important constitutional rights." On appeal, Berger argues that the use of a multiplier was improper. We disagree.

In *Ketchum*, *supra*, 24 Cal.4th 1122, the Supreme Court explained: "[A] court assessing attorney fees begins with a touchstone or lodestar figure, based on the 'careful compilation of the time spent and reasonable hourly compensation of each attorney . . . involved in the presentation of the case.' . . .

". . . [T]he lodestar is the basic fee for comparable legal services in the community; it may be adjusted by the court based on factors including, as relevant herein, (1) the novelty and difficulty of the questions involved, (2) the skill displayed in presenting them, (3) the extent to which the nature of the litigation precluded other employment by the attorneys, [and] (4) the contingent nature of the fee award. . . . The purpose of such adjustment is to fix a fee at the fair market value for the particular action. In effect, the court determines, retrospectively, whether the litigation involved a contingent risk or required extraordinary legal skill justifying augmentation of the unadorned lodestar in order to approximate the fair market rate for such services. . . .

". . . '"[A] contingent fee contract, since it involves a gamble on the result, may properly provide for a larger compensation than would otherwise be reasonable."' The purpose of a fee enhancement, or so-called multiplier, for contingent risk is to bring the financial incentives for attorneys enforcing important constitutional rights, such as those protected under the anti-SLAPP provision, into line with incentives they have to undertake claims for which they are paid on a fee-for-services basis.

"The economic rationale for fee enhancement in contingency cases has been explained as follows: 'A contingent fee must be higher than a fee for the same legal services paid as they are performed. The contingent fee compensates the lawyer not only for the legal

services he renders but for the loan of those services. . . . 'A lawyer who both bears the risk of not being paid and provides legal services is not receiving the fair market value of his work if he is paid only for the second of these functions. If he is paid no more, competent counsel will be reluctant to accept fee award cases." . . .

"Such fee enhancements are intended to compensate for the risk of loss generally in contingency cases *as a class*. . . . In cases involving enforcement of constitutional rights, but little or no damages, such fee enhancements may make such cases economically feasible to competent private attorneys." (*Ketchum*, *supra*, 24 Cal.4th at pp. 1131–1133, citations omitted.)

Ketchum also contained a cautionary note: "Of course, the trial court is not *required* to include a fee enhancement to the basic lodestar figure for contingent risk, exceptional skill, or other factors, although it retains discretion to do so in the appropriate case; moreover, the party seeking a fee enhancement bears the burden of proof. In each case, the trial court should consider whether, and to what extent, the attorney and client have been able to mitigate the risk of nonpayment, e.g., because the client has agreed to pay some portion of the lodestar amount regardless of outcome. It should also consider the degree to which the relevant market compensates for contingency risk, extraordinary skill, or other factors . . . . We emphasize that when determining the appropriate enhancement, a trial court should not consider these factors to the extent they are already encompassed within the lodestar. The factor of extraordinary skill, in particular, appears susceptible to improper double counting; for the most part, the difficulty of a legal question and the quality of representation are already encompassed in the lodestar. A more difficult legal question typically requires more attorney hours, and a more skillful and experienced attorney will command a higher hourly rate. . . . Indeed, the '"reasonable hourly rate [used to calculate the lodestar] is the product of a multiplicity of factors[, including] the level of skill necessary, time limitations, the amount to be obtained in the litigation, the attorney's reputation, and the undesirability of the case."' . . . Thus, a trial court should award a multiplier for exceptional representation only when the quality of representation far exceeds the quality of representation that would have been provided by an attorney of comparable skill and

experience billing at the hourly rate used in the lodestar calculation. Otherwise, the fee award will result in unfair double counting and be unreasonable. Nor should a fee enhancement be imposed for the purpose of punishing the losing party." (*Ketchum*, *supra*, 24 Cal.4th at pp. 1138–1139, citations omitted.)

We conclude that the trial court was faithful to *Ketchum*. The work by Dobias's attorney "far exceed[ed] the quality of representation that would have been provided by an attorney of comparable skill and experience billing at the hourly rate used in the lodestar calculation" (*Ketchum*, *supra*, 24 Cal.4th at p. 1139), and the use of the multiplier properly compensated him for the large contingent risk he undertook (see *id*. at pp. 1132–1133). No abuse of discretion has been shown.

3. Sufficiency of the Evidence

Plaintiffs contend that the trial court made various errors in calculating the attorney fees award of $92,337.25. We have reviewed the detailed declaration of Dobias's attorney and conclude that the award was amply supported by the evidence. In fact, the declaration would have supported a higher award. To the extent there was conflicting evidence on the attorney fees issue, we defer to the trial's court resolution of the conflict and assume that the conflict was resolved in Dobias's favor. (See *Christian Research Institute v. Alnor* (2008) 165 Cal.App.4th 1315, 1322–1323.) Plaintiffs also point out that Dobias's papers contained some typographical errors. But a few spelling mistakes do not detract from the substance of Dobias's arguments.

C. The Award of $5,062.50

Plaintiffs argue that the October 16, 2007 award of $5,062.50 to Dobias for successfully opposing their motion for reconsideration was void because it was made after the effective date of Judge Jones's disqualification. "[D]isqualification occurs when the facts creating disqualification arise, not when disqualification is established." (*Christie v. City of El Centro* (2006) 135 Cal.App.4th 767, 776.) Berger filed his declaration of disqualification on November 15, 2007. The disqualification request was deemed granted because Judge Jones did not file a response within 10 days.

Berger's declaration of disqualification did nothing more than criticize Judge Jones's rulings. But adverse rulings, by themselves, do not cause a reasonable person to doubt a judge's impartiality or suggest bias against an attorney. (See *Briggs v. Superior Court* (2001) 87 Cal.App.4th 312, 318–319; *In re Focus Media, Inc*. (9th Cir. 2004) 378 F.3d 916, 931.) It is in the nature of litigation that one party will prevail and the other lose. Berger's declaration is devoid of facts that would support disqualification. Accordingly, we conclude that Judge Jones was not disqualified before Berger filed his declaration on November 15, 2007. It follows that the October 16, 2007 award of $5,062.50 was not invalid or otherwise affected by Berger's request for disqualification. (The same analysis and conclusion apply to the October 17, 2007 judgment for $92,337.25.)

D. The Award of $11,043.75

Neither notice of appeal mentions or implicitly refers to the February 27, 2008 award of $11,043.75 — which was made after both appeals were filed — for successfully opposing plaintiffs' ex parte application to vacate the judgment. Plaintiffs contend that because the October 17, 2007 judgment is invalid, all subsequent orders are invalid. We have concluded that the judgment is valid. (See pt. II.B., *ante*.) Plaintiffs attack on the award of $11,043.75 is therefore without merit.

E. Joint and Several Liability

Berger argues he should not be jointly and severally liable for the attorney fees awards and that, at most, he should be liable for two-thirds while his client, Tang, is liable for one-third, based on the number of causes of action they each alleged. He cites no authority in support of this argument, so we decline to reach it. (See *Schoendorf v. U.D. Registry, Inc*. (2002) 97 Cal.App.4th 227, 237–238.)

F. Dobias's Request for Sanctions and Appellate Attorney Fees

Dobias contends this is a frivolous appeal and requests sanctions accordingly. Although it is a close question, we conclude otherwise. (See *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 649–651.) And Dobias's request for appellate attorney fees should be presented to the trial court on remand. (See Cal. Rules of Court, rule 3.1702(a), (c).)

III

DISPOSITION

The judgment and orders are affirmed.

NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

CHANEY, J.